



Reasonable Breaks and Lactation Rooms for Nursing Employees – New Law Leaves Employers Without Answers

Employers must now provide reasonable breaks for nursing mothers for up to one year after the child's birth according to the recently enacted Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010 (collectively PPACA), effective March 23, 2010. Although the Fair Labor Standards Act (FLSA) did not before require breaks for any employees, the PPACA amends the FLSA to require employers to provide for such breaks for employees who need to express milk as well as provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public[.]" An employer with fewer than 50 employees is not required to comply if the employer can show that the requirements may impose significant difficulty or expense.

Penalties for violating the new law can include civil or criminal fines imposed by the Department of Labor. Also, if a private action is filed, a prevailing employee would be entitled to recover reasonable attorneys' fees and costs.

While the law appears straightforward, many questions remain. For example, although the new law provides that an employer is not required to compensate an employee during such breaks, this seemingly contradicts the FLSA's general rule that short breaks (generally less than 20 minutes) are considered compensable time. To the extent that scheduled breaks are paid under either the employer's existing policies or

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pursuant to pre-existing FLSA law, it would be a prudent decision for employers to also pay for the nursing employee's break to ensure all employees are paid the same. Additionally, the new law does not speak to what is considered a reasonable amount of time and whether the employee is entitled to unlimited breaks. Such ambiguity heightens the risk of litigation over such issues. To avoid doubt, employers should have a dialogue and try to reach an understanding with the employee who is nursing so that each are clear as to how many break requests are anticipated and perhaps work out a schedule beforehand.

The new law will also pose additional challenges for employers who do not have the benefit of easily identifiable space for nursing mothers, such as a construction site. Further, for some positions employers will have to determine if the number of breaks will require realigning other employees to fill-in for the nursing employee while on break.

Employers should also be mindful of the need to comply with any applicable state law regulating the rights of nursing mothers. To the extent state law is more favorable to the employee, those provisions would prevail over federal law.

The Department of Labor is expected to issue regulations interpreting these new requirements. Hopefully, such unanswered questions will be addressed to provide more clarity. For further information regarding the PPACA, please contact your principal Squire Sanders lawyer or one of the individuals listed in this Alert.

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